SOME RECENT DECISIONS UNDER THE WORKMEN'S COMPENSATION ACTS OF MASSACHUSETTS AND MICHIGAN.

While the workmen's compensation acts have been in effect in Michigan and Massachusetts for only a little over a year, there have been in the last few months several decisions of considerable importance construing these acts. Two of these indicate that compensation is payable for all disease contracted in the course of the employment.

The definition of the injuries covered by the Massachusetts and Michigan Acts is copied, with certain significant omissions, from that in the English Acts of 1897 and 1906. The English Acts provide that "if in any employment a personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall . . . be liable to pay compensation." The provision in the Massachusetts and Michigan Acts is that "if an employee . . . receives a personal injury arising out of and in the course of the employment, he shall be paid compensation."

While the English courts have, after considerable vacillation, held that the word "injury" includes disease contracted in the course of the employment,[1] they have construed the phrase "by accident" to mean *"by an accident,"* so definitely excluding from compensation all injuries of gradual growth, whether impairment of the physical structure of the body[2] or disease.[3] In order to recover for a disease contracted, it is therefore necessary for the sufferer to allege and prove that it had its origin in some condition encountered in his work at some particular time and place.[4] Thus

[1]Brintons Limited *v.* Turvey [1905] A. C. 230; Ismay, Imrie & Co. *v.* Williamson [1908] A. C. 437; Sheeran *v.* Clayton & Co., 3 Butterworth, Workmen's Compensation Cases, 583; Sheeran *v.* Auchenlea Coal Co. (1911) 48 Sc. L. Rep. 786.

[2]Walker *v.* Hackney Bros. (1909) 2 Butterworth, Workmen's Compensation Cases, 20; Coe *v.* Fife Coal Co. (1909) 46 Sc. L. Rep. 328; but compare McInnes *v.* Dunsmuir 45 Sc. L. Rep. 804.

[3]Steel *v.* Cammell, Laird & Co. (1905) 2 K. B. 232; and this is true though the effect of the constant slow poisoning is a sudden seizure, as by a stroke of paralysis. Eke *v.* Hart-Dyke (1910) 2 K. B. 677; Broderick *v.* London City Council (1908) 2 K. B. 807; Marshall *v.* East Holywell Coal Co. (1905) 21 T. L. R. 494.

[4]In Eke *v.* Hart-Dyke (1910) 2 K. B. 677, it was held that it was not enough to show three occasions in one of which the disease must have been contracted. It is necessary to show the particular occasion of its origin.

occupational disease, in its more usual sense of disease contracted by slow infection or resulting gradually from a constant subjection to unhealthful work conditions in the course of the labor, is excluded. Such diseases are compensated, if at all, under their Occupational Diseases Act, passed as a species of supplement to the Workmen's Compensation Act of 1906.

In the Michigan case of *Adams* v. *The Acme White Lead & Color Works*,[5] the full Board on review calls attention to the omission of the phrase "by accident" in their Act, and holds that lead poisoning, though a disease caused by subjection to poisonous substances in the employee's work and so an occupational disease in its stricter sense, is an injury within the meaning of that Act.

In *Stone* v. *Travelers Insurance Co.*,[6] the employee was required in the course of his employment to row a skiff which to his employer's knowledge was leaky; the employee's feet were wet by the water therein and he thereby contracted pneumonia. This was held on review by the full Board to be an injury by the terms of the Massachusetts Act. While this decision on its face does not go beyond the decisions of the English courts construing their Acts, since the disease was one contracted on a particular occasion, the time and place of which could be stated and proved with certainty, the language of the Board in calling attention to the fact that the injury need not be "by accident" is significant and points to a liability similar to that recognized in the Michigan case; while in *Johnson* v. *London Guarantee & Accident Co., Ltd.*,[7] an employee suffering from lead poisoning was held to be entitled to compensation, and this though the sufferer had become particularly susceptible to it by old age and grief at the death of his wife.

To one who is conversant with the decisions construing the English Acts of 1897 and 1906, from which, with the omission noted by these opinions, the language used in the Michigan and Massachusetts Acts is copied, these decisions, while perhaps not inevitable, do not come as a surprise.[8] But there still remains the question of the policy of using such language, capable, as it evidently was, of a construction which makes the Acts cover not only work accidents in their stricter sense, resulting in incapacity due to

[5]Reported in Bulletin No. 3, issued by the Industrial Accident Board of Michigan, at p. 31.

[6]Case 342, in "Reports of Cases under the Massachusetts Workmen's Compensation Act," from July 1, 1912 to June 30, 1913, at p. 470.

[7]Case 230, in "Reports of Cases under the Massachusetts Workmen's Compensation Act," from July 1, 1912 to June 30, 1913, at p. 371.

[8]See 25 Harvard Law Rev. 344-348.

the impairment of the physical structure of the body, but also disease contracted, including that sort of disease which is of gradual growth and is caused by the unhealthy nature of the trade or by the constant subjection to unsanitary conditions under which the work is performed, either those inherent in the nature of the trade, as where it involves the handling of poisonous substances, etc., (occupational disease in the strict sense of that term), or those not thus inherent in the trade but due to the employer's disregard of his work-people's health.

While disability caused by occupational diseases should be as proper a subject for compensation as similar disability caused by injury to the physical structure of the body, there are many reasons why the two should be kept distinct and provided for in separate acts. In drafting legislation it is not to be forgotten that one has to deal with actual and not ideal conditions. One of the conditions which must be considered is this—the act must be applied to actual occurrences. The true state of facts in each case must be in some way made to appear. Were it possible to devise any system of proof so infallible that the true state of facts could always appear with absolute certainty, the task of legislation would be simple indeed. Unfortunately no such system of proof has been nor can be devised. Facts must be made to appear by the testimony of witnesses, and this involves the uncertainties necessarily inherent not only in the inaccuracy of human perception and the fallibility of human memory, but also in the personal honesty, prejudice and interests of the witnesses, including the persons seeking or resisting compensation.

Perhaps the most serious objection to compensation acts is the grave danger, shown in the practical administration of such acts in foreign countries to be a very real one, that the less industrious and honest members of the working classes will endeavor to exploit them by claims for compensation for disability either nonexistent, or, if existing, in no way resulting from the employment. Such claims are often consciously fraudulent. But claims for compensation for disabilities in no wise attributable to the employment may even be advanced without any conscious fraudulent purpose on the part of the applicant. The well-known tendency of human nature unconsciously to seek to trace misfortunes to some cause which may be held legally responsible, is of itself sufficient to lead the workman, without impropriety or intent, to find or think that he has found in his employment some cause to connect every dis-

ability under which he labors with his work in his master's employment. Both of these tendencies have in practice been found to give rise to the principal criticism of the operation of the acts in force in Great Britain and on the continent. The opportunity for such fraudulent, or at least unfounded claims, against the employer or the insurance fund to which he contributes, great as it is where only injuries to the body are compensated, is greatly enlarged where compensation is allowed even for diseases contracted on some particular occasion in the course of the employment and is immensely increased when it is allowed for all diseases of slow growth contracted therein.

The cause of injuries to the physical structure of the body is in general, though not always, capable of being shown with reasonable certainty by some fairly reliable method of proof. A man's arm can scarcely be broken or his fingers cut or crushed without those near to him knowing it. Even where the injury is an internal strain or rupture, the sufferer usually shows some immediate external sign of it, and it can be at least shown that he was or was not, at or about the time when the strain was first felt, engaged in work capable of producing it, and, in the majority of cases, the injuries are of a sort which do not usually result from causes other than those found within the ambit of his work in his master's employment.

On the other hand, diseases, except of certain very special kinds, may be contracted anywhere, as everyone knows. Every day experience shows that there is nothing more difficult to say with any precision than where, or when, or how a sufferer contracts his illness. The only method of proof available is for the claimant to prove that he was subjected in his employment to certain conditions to which he attributes his illness. This would be supplemented by the testimony of that most unreliable class of witness, the partisan medical expert, to the effect that such conditions might and in this case probably did cause the illness in question. There is no doubt that in some few cases the evidence might with precision show that the illness must have been caused by certain unsanitary conditions, and that the sufferer had not encountered such conditions except in the course of his labor. But such cases are comparatively rare.

This method of proof, uncertain as it is when the claimant must prove the precise occasion on which he contracted his disease, becomes infinitely more so if he is allowed compensation for dis-

ease of gradual growth or due to slow infection. In the first case, he must at least show that on the occasion in question he was subjected to conditions adequate to cause the disease complained of, and that at or about that time he encountered no similar conditions outside of his employment. In the second case, while he may be able to show that the usual conditions of his work were such as tended to bring about his illness, to prove that he had encountered no similar condition outside his work would require a scrutiny of his life for an indefinite period, as to which no evidence would usually be available except his own testimony or the testimony of those whose interests were substantially the same as his.

It must be remembered that if any disease is included, all diseases are included. The workman crippled by rheumatism or suffering from consumption contracted in his last employment might readily obtain compensation from his employer by proof that his place of work was damp or drafty, or that he had been constantly subjected to changes of temperature. Medical testimony could easily be obtained to show that such conditions tend, as they undoubtedly do, to create such diseases, but this would leave out of account the non-working hours during which the employee in his own house or elsewhere might as readily be subjected to similar or worse conditions. The testimony, while it might show the possibility that the conditions of labor might have caused the disease, would rarely if ever exclude the practically equal probability that it was caused by similar conditions encountered elsewhere. Unless the acts contained provisions restricting compensation to the few cases where the proof definitely excluded the probability of the disease being contracted outside of the work, the well-known tendency of those in charge of the administration of such acts, humanitarian, almost charitable as they are in their impulse, will lead them, at least at first, to give relief whenever there are any colorable grounds for doing so,[9] and will almost to a certainty result in imposing upon the employer the burden of maintaining what would amount to practically a general illness pension. No act has contained any such restrictive provisions, apparently for the very simple reason that neither the drafters nor the legislators had

[9]The Massachusetts Industrial Accident Board, in its Report for 1914, criticised the insurance companies for having "often refused compensation on the ground of a strict technical interpretation of the law. * * * Both the Industrial Accident Board and the Supreme Judicial Court have adopted the principle of a liberal interpretation of the Act in the light of its humane purpose."

any very definite idea as to whether disease was or was not covered by the acts which they prepared and passed.

In addition, it is manifest that, in any act which places the burden of paying compensation upon the immediate employer of the injured employee, the liability for compensation for injuries of slow growth, whether impairments of the physical structure of the body or disease, should be kept separate and distinct from those sustained or contracted on a particular occasion. It seems quite clear that, while the particular employer ought to pay for the harm his business does to those employed therein, he should not be required to pay for the harm done by his trade rivals. Yet, if the employer in whose service the effects of a slow exposure to over-arduous or unsanitary work conditions finally manifests itself is made liable for compensation for the resulting incapacity, he would, except in the rare case where the sufferer had passed his entire trade life with that employer, be forced to pay for the whole of a harm caused only in part by his business and in part, and perhaps much the larger part, by the business of his rivals. In the English Act there is an elaborate system by which compensation is apportioned among all the employers whose business has subjected the workman to a gradual infection. Whether such provisions could be conveniently inserted in a workmen's compensation act is perhaps doubtful, it is certain that no such provisions appear in either the Massachusetts or Michigan Act. And it is equally certain that without them not only is the employer, in whose employment the incapacity develops, unfairly made to bear the entire burden of repairing a harm, done only partly by his business, but the effect on workmen in the more unhealthy trades will be most detrimental.

Most persons would be glad to see all trades made safe and all unhealthy trades disappear and to feel that no man need be forced to labor in an employment which inevitably leads in a large proportion of cases to incapacitating disease; yet as society is at present constituted, such trades must exist and many men must live by their labor in them, until the use of human labor therein with the inevitable destruction of life involved can be superseded by the exclusive employment of machinery. It is easy to see that if the last employer, the one in whose business the incapacity first appears, is forced to pay all the compensation due to the continued exposure in other plants as well as his own, the age of enforced compulsory superannuation must be greatly reduced. And, bad

as is the condition of workmen in such trades when allowed to work out the brief span of life remaining to them under the unhealthy conditions prevalent therein, it would be much worse were they turned adrift infected and incapacitated for other labor. The temptation to employers to discharge their workmen just before the infection manifests itself in actual incapacity would be irresistible by any but the most humane of employers, and no prudent employer would risk taking into his service a man in this condition. The social consequences, bad as they are now, when a certain number of persons are inevitably incapacitated, would be made much worse if such trades were constantly enlisting healthy and untainted men and turning them out just before their point of total incapacity, shattered in health and incapable of effective self-support, in order to begin again the process of drawing upon the fresh, untainted blood of the working classes to again infect and discard it.

While occupational diseases should certainly be made the subject of compensation, they should be covered, either as in Germany by an act providing a general pension fund for all illness, whether contracted within or without the employment, a plan for which American public opinion does not seem to be at present ready, or, as in England, by an Occupational Diseases Act restricted to diseases the causes of which are particularly apt to be encountered in particular trades and rarely met with elsewhere. Such acts should and probably will be passed, but in them, at least at first, certain notoriously unhealthy trades should be specified, and the diseases, to which medical experience has shown that such trades peculiarly tend to subject the workers therein and which are unlikely to be contracted elsewhere, should alone be made the subject of compensation. Power may, and perhaps should be given, to some medical board to increase the list of such diseases, as experience enables the board to classify new diseases as peculiarly apt to affect workers in particular industries because of the nature of the conditions therein encountered. And such act should provide, as does the British Occupational Disease Act of 1906, for a just and proper apportionment among all the successive employers, in whose service the sufferer has been gradually infected or poisoned, of the burden of paying the compensation for the resulting incapacity.

It is well also to note that the Michigan and Massachusetts rulings, if carried to their logical conclusion, would equally require

an employer to make compensation for deterioration of the muscular or physical structure of the body due to long and continued service, and should logically entail liability for premature superannuation due to the severe character of the work on which the workman is engaged, or, to the fact that though the work is not unusually severe, he is physically unable to bear the strain of ordinary labor.[10]

If the acts as drawn require such a result or are even capable of such a construction, it seems extremely unfortunate that the legislatures which passed them did not fully recognize the effect of these provisions. While some few persons may favor and desire to see legislatively enacted a general workmen's pension act, providing pensions for the superannuated workman as well as for one who is suddenly deprived of his earning power by a work accident, it is quite clear that the popular opinion, which has demanded with apparent vigor and unanimity workmen's compensation acts, has not yet become definitely crystallized in favor of any such drastic social legislation. And it is certain that such a pension scheme, even if desirable, is not properly part of a workmen's compensation act, and should, like compensation for industrial diseases, be provided, if at all, in a separate act.

(TO BE CONCLUDED.)

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[10]See Clover, Clayton & Co. *v.* Hughes [1910] A. C. 242; Dotzauer *v.* Strand Palace Hotel, 3 Butterworth, Workmen's Compensation Cases, 387.